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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

EARL C. BERGER
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022

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This Reply is respectfully submitted because the Respondent's Brief In Opposition studiously ignores the vital, principal Question Presented by Petitioners and instead *substitutes* a wholly different Principal Question.

The Principal Question presented by the Petition is:

> "Whether, if both Houses of Congress cannot constitutionally enact legislation segregating creditors of the Federal Government into preferred and secondary creditors, can the Secretary of Defense accomplish this very result by administrative fiat, reducing statutory salaries?"

Whereas the Respondent substitutes an entirely different Question, whether the Secretary of Defense is required to fix salaries for teachers of minor dependents of military personnel at rates *equal* (sic) to the rates of basic compensation for similar positions in the United States. The Respondent's statement of the Question Presented reads:

> "Whether 5 U.S.C. 2352(c) required the Secretary of Defense to fix salaries for teachers of minor dependents of military personnel at rates equal to the rates of basic compensation for similar positions in the United States."

It is important to point out that while other teachers, other than the Petitioners in this case, but who were expressly excluded from this case, prayed for rates equal to the rates prevailing in the United States, in *Crawford et al* v. *United States,* 179 Ct. Cl. 128; 376 F.2d 266 (1967), cert. den. 389 U.S. 1041, Appendix G, Petition, (pp. 29a-55a), which was not a class action, your Petitioners did not ask for rates equal to those in the United States, but for the rates specified in the basic Pay Act, viz, *"in relation to"* stateside rates. (See: Amended Complaint, Para. 7, Appendix on Appeal, p. 11.)

Your Petitioners' claim is based upon the wording of the basic Pay Act, Public Law 86-91, prior to its amendment in 1966 by Public Law 89-391. Prior to such amendment the basis was "in relation to", whereas the 1966 amendment substituted the words "equal to" in place of "in relation to".

In brief, the Petitioners contend, and the record is clear, that the Respondent did not pay rates in relation

to stateside rates, but segregated Petitioners apart from all other creditors, casting them into the category of secondary creditors, on the premise that if the statutory basis were observed and salaries paid in relation to stateside salaries, other school personnel and suppliers could not be paid their statutory entitlements in full. Accordingly, the Secretary selected the teachers to subsidize all other creditors, and the Question presented is whether the Secretary had the power to segregate creditors of the Federal establishment into preferred and secondary creditors based upon alleged budgetary considerations.

If such power exists the Secretary of Defense can discount sergeants' salaries while paying full statutory rates to commissioned officers, on the premise that if he paid sergeants and private soldiers their statutory rates he might not be able to pay all other creditors, suppliers, shipbuilders and others.

The gravamen of Petitioners' complaint is that the Secretary presumably computed teachers' salaries on the basis provided for in the regulation intended to implement the basic Pay Act, which calls for teachers' salaries "in relation to" those in the United States, but after engaging in such hypothetical exercise, the Secretary subtracted whatever sums he saw fit, in his "discretion", in order to achieve a forced, fictitious average cost for schooling each pupil. He selected the teachers to be the victims of his bookkeeping convenience, paying all other creditors their entitlements in full.

The regulation for determining teachers' salaries is set out in full in the Appendix to the within Petition at pp. 20a-23a,—the "Salary Determination Proce-

dures"—and provides that "(1) The compensation schedule will be reviewed annually", and that

> "4. The compensation schedule will be established and adjusted 'in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia".
>
> . . . .
>
> "(a) Comparison for the purpose of establishing the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possibe will be utilized."

No annual Appropriation Act funding the school program refers to teachers' salaries or refers to the Teachers Basic Pay Act, Public Law 86-91, which remained in full force and effect for each of the years in question.

Judge Philip Nichols in the Court of Claims case of *Crawford et al.* v. *United States, supra,* crystallized the situation in his vigorous dissent (see: Appendix E, pp. 50a-51a, this Petition) when he stated:

> "Assume then, the Secretary had not the apparently impossible task of determining an exactly 'equal' compensation, but of finding one that was 'in relation,' he could have exercised his authority validly to select any figure within a range. If budgetary considerations had led him to prefer the lower side of the range, his choice would not have been subject to challenge in court. But here he made a two step determination. In every year after 1961, he selected a figure that he found was

'in relation,' *and then afterwards he cut it substantially to meet his budget exegencies.* This procedure seems to me in a manner to say to the teachers involved, to the Congress, and to this court, that the final figures were not 'in relation' and were out of 'relation' to the statutory guidelines, by amounts furnished to the Congressional Committees. (emphasis supplied)

It is conceded, as it must be, that he could not cut a statutory salary to avoid incurring a budget deficiency, or at least, if he did, the difference would be recoverable in this court. *United States* v. *Langston,* 118 U.S. 389 (1886). See the long line of cases cited, *Lovett* v. *United States,* 104 Ct. Cl. 557,582, 66 G. Supp. 142 (1945), aff'd on other grounds, 328 U.S. 303 (1946).

If, for fear of a budget deficiency, the salary is set below the range the guidelines permit, the situation is the same as if a fixed salary were cut. If the Secretary had not made his determination, within the guidelines, and then cut it, there might be some question as to the measure of damages, but here he has solved that problem for us, at least sufficiently for the purpose of a dissenting opinion."

To quote Judge Nichols' concluding remarks (Appendix E, this Petition, p. 53a):

"Defendant's whole handling of this case has an odd flavor I find it hard to give a name to. They are stuck with their position. They must do their best to defend it, as they do. Yet, if the plaintiffs should prevail, I cannot picture the Pentagon being draped in black. The exigencies of Government as it is practised force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in. If an institution less august than the Department

> of Defense were involved, I would call its role in this litigation ignominious."

As pointed out in the Petition (p. 19), in the case of *New York Airways, Inc.* v. *United States,* 369 F.2d 743 (Ct. Cl. 1966), the statute provided for a subsidy in amounts to be determined by the CAB in accordance with standards set forth in the statute, and when thereafter subsidy payments became exhausted the Government discontinued making such payments on the ground that its liability was limited to amounts appropriated. The Court disagreed:

> "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. . . ."

An important omission from Respondent's Brief in Opposition is its failure to comment on a vitally important factor. It has wholly failed to advise the court *how much it did spend* to operate the schools. Whereas the Respondent keys its justification for segregating teachers into secondary creditors on the premise, of a surmise, that a deficiency would or could result if it paid teachers full statutory salaries, *it cannot tell the court how much it did spend.* Petitioners submitted Interrogatories requesting such information but the Department of Defense answered same by saying that the records establishing costs and expenditures are no longer available. Please refer to these Interrogatories and Answers thereto at pp. 17-18, this Petition.

Thus the issues joined by this unprecedented litigation have resulted in the lower courts' judgment establishing the unwarranted precedent that trustees of public funds need not account for their stewardship

to anyone, and urge this Court to validate this unique contention. If permitted to stand trustee-fiduciaries of public funds need account to no one.

CONCLUSION

The Writ should be granted because:

1. It is vitally important to settle the unique, unprecedented assumption of power of the part of trustees of public funds to segregate creditors of the Federal Government into preferred and secondary creditors.
2. It is extremely important to vitiate administrators' license, established for the first time by the judgment herein, *to not account* for their expenditures of public funds of which they are trustees, and contend that their inability to account for such funds *ipso facto* clothes them with power to amend and repeal basic pay statutes by rhetorical exercises in the form of regulations.
3. The judgment establishes a wholly new precedent judicially sanctioning discrimination between classes of Government civil servants, reducing the statutory salaries of some of them who are prohibited by law from striking.

For the foregoing reasons the Writ should be granted.

Respectfully submitted,

EARL C. BERGER
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022